86 - 1337



NO._____

IN THE SUPREME COURT OF THE UNITES STATES

W.T. "BUTCH" BURNS, et al

PETITIONERS

v.

DELMAR WEST-LAMAR CONSOLIDTED
INDEPENDENT SCHOOL DISTRICT

RESPONDENT

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK D. MOORE
41 WEST SIDE SQUARE
P.O. BOX 28
COOPER, TEXAS 75432
214/395-2053

ATTORNEY FOR PETITONER

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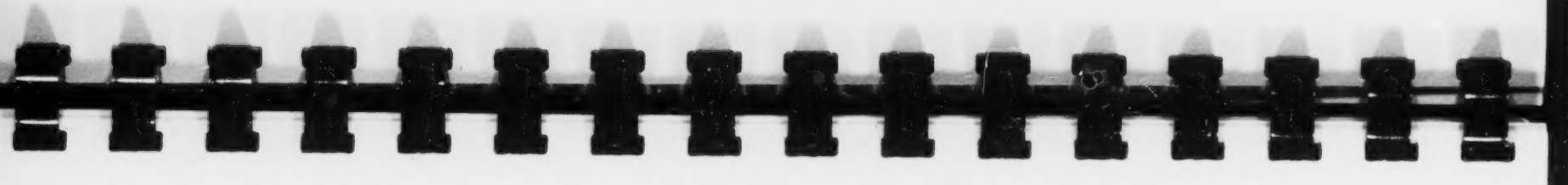

## QUESTION PRESENTED

1. Did the Trial Court error in ruling that the claims of the Petitioner were without merit and in refusing to convene a Three Judge Court to hear the issues?

2. Did the Trial Court error in ruling that the pleadings of the Plaintiff did not state a cause and the Federal claims were insubstantial so not to hear the issue of whether a State Statute is constitutional that requires a bond to be posted before a hearing on the merits or be dismissed from the cause of action?

## LIST OF PARTIES

The parties to the proceedings below were the Petitioners, **W.T. "Butch" Burns, Ted Carrington, Dwight Stegall, Roy L. Turner and Eddie L. Sams**, and the Resposdent, **Delmar-West Lamar Consolidated Independent School District, (now known as the Chisum Independent School District)**, and the Intervenor, **Jim Mattox, the Attorney General of the State of Texas.**

The same parties will be before this court.

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IN THE SUPREME COURT OF THE UNITED STATES

**W.T. "Butch" Burns, et al, Petitioners, Delmar-West Lamar Consolidated Independent School District, Respondent.** The Petitioners W. T."Butch" Burns, et al respectfully prays that a Writ of Certioari issue to review the judgement and opinion of the United States of Appeals for the Fifth Circuit, entered on November 11, 1986, upholding the order the Federal District Court for the Eastern District of Texas, Sherman Division, entered on the 20th day of March 1986.

**OPINIONS BELOW**

The opinion of the Court of Appeals for the Fifth Circuit is reprinted in the appendix hereto, page 46 infra.

The decision of the United States District Court for the Eastern District of Texas, Sherman Division is reprinted in the appendix hereto, page 47 infra.

## JURISDICTION

The Trial Court consolidated two suits, **P-86-10-CA** and **P-86-14-CA.**

The Petitioner invoking Federal jurisdiction under **42 U.S.C. Section 1971, 42 U.S.C. Section 1983c and subsequent, 28 U.S.C. Section 2201-2202, 28 U.S.C. 2284, and the Constitution of the United States and Amendments #1, #5, and #14,** brought this suit in the Eastern District of Texas, Sherman Division for the court to convene a Three Judge Court to hear issues of whether two elections should have been cleared under the Voting Rights Act, for a declaratory judgement and for relief from a State Statute as being unconstitutional under the due process clause of the constitution.

On Appeal, the Court of Appeals for the 5th Circuit entered a judgement on November 11, 1986, in a per-curiam opinion affirming the order of the District Court. No Petition for a rehearing was sought.

The jurisdiction of this Court to review the judgement of the Fifth Circuit is invoked under 28 U.S.C. Section 1254 (1).

## STATUTES INVOLVED

**Federal Statutes**

42 USC Section 1971

42 USC Section 1973c et al

28 USC 2201-2202

28 USC 2283

28 USC 2284

Constitution Amendments #1,, #5, and #14

**STATE STATUTES**

Texas Revised Civil Statutes

Art 717m-1

## TABLE OF AUTHORITIES

## STATEMENT OF THE CASE

This case involves the application of the Voting Rights Act of two elections held in Northeast Texas, one election held the 10th day of August, 1985, to consolidate two school districts and one election held the 2nd day of November 1985 to pass a bond election by the consolidated districts, and the constitutionality of a State Statute requiring a bond to be posted by opponents of the bond election to be able to prosecute their cause of action.

Two independent school districts, the Delmar Independent School District, and the West Lamar Independent School District held an election on the 10th day of August, 1985 to consolidate the two school districts. The election was not pre-cleared as required by **42 USC Section 1973c**. No request for clearance of this election was presented to the Attorney General of the United States until the 9th day of December, 1985. A letter dated the 7th day of February, 1986

was sent from the Attorney General's office stating that he had no objection to the submission on the election. The issue in this election is whether the submission was proper and if the failure of the Attorney General to object precludes any contest by the Petitioners.

The consolidated school district held an election for the issuance of bonds to build a new school on November 2, 1985. No clearance for this election was presented to the Attorney General of the United States until the 14th day of February, 1986. The issue of this election is whether the failure of the Attorney General to object precludes any contest by the Petitioners, and if there was a proper submission to the Attorney General. A letter dated the 3rd day of March, 1986 was sent from the Attorney General's office stating that he had no objections to submission on the using of a non-resident clerk for absentee voting. The parties in cause No. **P-86-10-CA**

filed an election contest in the District Court of Lamar County, Cause No. 51860, contesting the Bond election on the 25th of November, 1985 and the Appellee filed an action for a Declaratory Judgement under VACS 717m-1 in the District Court of Lamar County in Cause No. 51980, and joined the election contest in their Declatory Judgement and ask for a setting to require the Plaintiffs to file a bond in the sum of $500,000.00 or be dismissed from the cause of action.

The Plaintiffs filed an election contest on February 11, 1986, the Federal Law Suit No. P-86-10-CA, in which they ask that the State Statute 717m-1 be declared unconstitutional, that the court issue an injunction and that the election held on November 2, 1985, be held void for failure to secure clearance under the Voting Rights Act.

On Februrary 12, 1986, a hearing was held before the Honorable Wayne Justice on

Plaintiff's application for a Temporary Restraining Order and the Court found that the Appellee was a political subdivision of the State and subject to the provisions of the Voting Rights Act, that the bond election was subject to pre-clearance under the Voting Rights Act and that the Attorney General of the United States had not pre-cleared such bond election as of February 12, 1986 and a Temporary Restraining Order was issued restraining the Defendant, as requested by the Plaintiffs, and setting a hearing for February 21,1986.

A hearing was held before the Honorable Judge Paul Brown of Sherman of February 21, 1986, and the Temporary Restraining Order was continued until a ruling was made by the court.

On February 21, 1986 the Plaintiffs, in Cause No. P-86-10-CA, filed a complaint against Murray Winnie, the Superintendent of schools and the school board members of West Lamar Independent School District, and John

Brooks, the Superintendent of schools and school board members of the Delmar Independent School District, the same being in office at the time the consolidation election was held.

On February 26, 1986, the court entered an order consolidating the two causes of action for all further proceedings and that the two causes preceed under Cause No. P-86-10-CA.

The matter was set for hearing on the two causes on March 5, 1986, at which time the Court dismissed the Appellants application to convene a Three Judge Court to hear the Voting Rights violation, ordered that the Temporary Restraining Order previoulsy issued be dissolved, that the application for a Temporary Restraining Order be denied and that the Defendants motion to dismiss be granted. This order was signed on the 20th day of March, 1986, by the Honorable Paul Brown.

## REASON FOR GRANTING THE WRIT

**QUESTION NO. 1 RESTATED:**

**"Did the Trial Court error in failing to appoint a three Judge Panel to hear a voting rights case?"**

The decision of the Trial Court in this case is in direct conflict with many of the rulings of the Supreme Court and Federal Law. It is a Section 5, Voting Rights Action, and will affect the Nation as a whole and the law needs to be clairfied. If the decision is allowed to stand it will present a another "loop-hole" for covered jurisdiction to avoid the intent and the spirit of the Voting Rights Act.

This is a case of failure to obtain clearance of changes in voting procedures until after the election was held, and whether the election procedures used were such that they were required to be cleared by the Attorney General.

Congress, recognizing the importance of this type of action, has determined that all such cases must be heard by a Three Judge Panel. One of the issues before the court in this action is whether the Trial Judge committed error when he failed to impanel a Three Judge Court to hear the case.

The Trial Court failed to impanel the Three Judge Court, stating that it was within his authority to determine if the claims had any merit and since he concluded they did not have any merit then he was not obligated to impanel the Three Judge Court. The Trial Court has no authority to make a decision on the merit of the claims.

The Court dismissed the Plaintiff's cause of action by ruling that the elections had been properly cleared in its order of March 20th, 1986. This based on two letters received from the Attorney General's office and which the pertinent parts are stated forth below.

Letter dated March 3 1986, on the bond election:

"This refers to the procedures for conducting the November 3, 1985, special elections and the use of a non-resident absentee election clerk for that election by the Delmar-West Lamar Consolidated Independent School District in Fannin and Lamar Counties, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965 as amended, 42 USC 1973c. We received your submission on February 14, 1986.

The Attorney General does not interpose any objections to the changes in question."

Letter dated February 7, 1986 on the consolidation:

"This refers to the consolidation of the Delmar and West-Lamar Consolidated Independent School Districts; at large election of trustees; the procedures for conducting the August 10, 1985, special

election; and the bilingual election procedures for the Delmar-West Lamar Consolidated Independent School District in Fannin and Lamar Counties Texas, submitted to the Attorney General pursuant to section 5 of the Voting Rights Act of 1965, as amended, 42 USC 1973c. We received your submission on December 9, 1985.

The Attorney General does not interpose any objections to the changes in question."

The Trial Court stated in its order:

"These two letters clearly establish that both, the elections and the procedures used in conduction the elections, have now been submitted for approval and that the Attorney General interposes no objections."

This conclusion by the Trial Court is against the Statute 42 U.S.C. 1973c which specificially states:

"Neither an affirmative indication by the Attorney General that no objection will

will be made, not the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure."

Despite the clear wording and the intent of the Statute the Court dismissed the Plaintiff's cause of action because of the clearance letters.

Neither of the elections were timely or properly submitted and the Court should have referred the matter to a Three Judge Panel.

The submission for clearance for the consolidation was not timely submitted, the election was held on August 10, 1985, and the clearance was not submitted until December 10, 1986, which is four months after the consolidation election was held, thirty-three days after the bond election, and ten days after the election contest was filed. It appears as if the Appellee was going to wait until the results of the bond

election was known before they submitted the election, or the State Election contest prompted the Appellee to act.

The submission of the Bond Election was not timely submitted, the election was held on **November 2, 1985** and the submission was received by the Attorney General on the **14th day of February, 1986.** This was over **ninety** days **after** the bond election was held and **three** days **after** the Original Petition complaint in **P-86-10-CA** was filed, and **eighty-one** days **after** the first election contest was filed.

The statute clearly states that the election is to be submitted **before** the election is held. The failure to submit timely has been addressed by the Supreme Court in **N.A.A.C.P. v. Hampton County Election Commission, U.S. 105 S Ct. 1128,, 1138 (1985)** in foot note 19 on page 1134 of that opinion in which the concern of the Court was expressed by citing the Senate report which said:

"Timely submission of proposed changes before their implementation is the crucial theshold element of compliance with the law. The Supreme Court has recognized the enforcement of the Act depends upon voluntary and timely submission of changes subject to preclearance.

The extent of non-submission documented in both the House hearing and those of this committee remains surprising and deeply disturbing. There are numerous instances in which jurisdiciton failed to submit changes before implementing them and submittied them only, if at all, many years later when sued or threatened.

Put simply, such jurisdicitons have flouted the law and hindered the proteciton of minority rights in voting."

This failure to submit the elections for clearance prior to holding the elections are clearly a violation of the statute and there is no provision in the Statute to clear the elections after the election has

been held.

The act will never be effective if parties are continuely allowed to hold elections and then get them cleared **after the fact.** Only when the law is followed and clearances are obtained before an election will discrimination be eliminated. Once an election is held there is no way in which you will be able to tell who was denied the right to vote and what effect that vote would have had on the election.

So no matter what the Attorney General had done the Trial Court errored in considering the letters from the Attorney General in determining that the claim had no merit, and the Court should have convened a Three Judge Court to hear the matters.

The Appellees have relied on **Berry vs. Doles, 438 U.S. 190, 98 S. Ct 2692, 57 L Ed. 2nd 693 (1987)** in their briefs in both the Trial and the Appeals Court as being the current law in this area and yet the Supreme Court in **N.A.A.C.P. vs Hampton County Elec-**

**tion Commission**, supra, in its dicta has indicated that **Berry** is limited to the facts of that case and questioned the conclusion of the Trial Court. The Court in footnote 36 explained the ruling in **Berry** as follows:

**" In that case, however, the District Court had previously acknowledged that the changes were covered by Section 5 and had reached the question of an approximate remedy."**

Therefore, **Berry** does not apply to the facts in this case, as the issue in this case is whether the changes should have been submitted prior to the election was never reached.

The issue of post-clearance was discussed further by the Court in **McCain vs Lybrand, 104 S. Ct. 1037 (1984)** which was decided six years after the **Berry** case. The Court stated in the **McCain** case;

**"The "preclearance" requirement mandated by Section 5 of the act is perhaps the most stringent of these remedies, and**

certainly it is the most extraordinary. It prohibits jurisdictions which have engaged in certain violations of the Fifteenth Amendment from implementing any election practices different from those in effect on November 1, 1964 pending scrunity by Federal Officials to determine whether changes are racially discriminatory in purpose of effect."

It is very plain there is no provision for post-clearance of a change in election procedure. The Court has stated that jurisdictions are prohibited from holding elections until they have been cleared. This is the only interpretation of the Statute that will insure that there will even be substantial compliance with the intent of Congress. If the covered jurisdictions are allowed to get post-clearance they will hold the election and then apply for clearance, the burden will then fall on the contestant and not the submitting party.

In Allen vs State Board of Elections,

393 U.S. 544, 89 S. Ct. 817 (1969), the court in discussing the different burdens for a State applying for a declaratory judgement and a private citizen states that when a private individual brings an action **"the only issue is whether a particular enactment is subject to the provisions of the Voting Act, and therefore, must be submitted before enactment."** Again the Court pronounced that it must be **before** the election.

The next area of iquiry must be actual submissions made to the Attorney General and if they were proper.

We must look at the facts as plead, the briefs filed and the evidence taken to see if there was proper submission.

According to the pleadings on file and the briefs filed in the Trail Court, in cause **No. P-86-10-CA**, (the consolidation election) there was a failure to properly submit the election and the effect of the consolidation of the two school districts on the voting strength of the minority popu-

lation. The submission for clearance to the

On examination we find only the student ratios were submitted, not the general population, there is no submission of the effect of the consolidation the voting strength of the minority community. The Appellees have claimed that the consolidation of two school districts is not a subject of Section 5, as state law requires each district to vote independently, yet if the election carries there will no longer be two districts, only one. This change in voting procedure or the size of the voting district would require clearance as it had the potential of discrimination as one of the districts is 19% minority and one is only 3% minority. Regardless of what State law, they must still follow Federal law and secure clearance. This effect of consolidation was discussed in **N.A.A.C.P. vs. Hampton County Election Commission**, supra, where the Attorney General had withheld his approval of a State Statute

until he was assured that the new County Board did not have the authority under South Carolina Law to consolidate the school district. Consolidation, like annexation, had the potential for discrimination in voting and must be cleared.

The same principal was discussed in **Perkins vs Mathews, 400 U.S. 397, 91 S. Ct. 431, 27 L.Ed 2nd 476 (1971) on remand (SD Miss) 336 F. Supp 6.** This was an annexation case in which the composition of the electorate was effected and the Court found that this was a matter that required clearance. Here, also, there is a change in the electorate, and the matter must be summitted for clearance.

**"A request for pre-clearance for certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission on the latter practice."**

The Court went on to say,

**"To the extent there was any ambiguity in the scope of the pre-clearance request, the structure and purpose of the pre-clearance requirement plainly counsel against resolving such ambiguities in favor of the submitting jurisdiction in the circumstances of this case. The pre-clearance process is by design a stringent one;....."**

In this case, the Trial Court went further and stated that a Three Judge Panel had no authority to hold the elections void, therefore, there was no relief that could be given. By using this and the failure of the Attorney General to object the claims under the Voting Rights Act were dismissed. The Plaintiff was never allowed to present their case to the Court as it was summarily dismissed. A Trial Judge cannot dictate on what relief a Three Judge Panel, and Appeal Court or even the Supreme Court, can do and yet this is the holding in the Trial Courts order. In the Bond election there were several

variations in the voting procedures that occured during the election process and they were plead in the Trial Court; to wit;

1. The elimination of the absentee voting place from the area of the largest percentge of minority residence. This was admitted by live testimony in the Trial Court by the Superintendent of the school district.

2. No proper notice of hearing to call the election under **State Law Vernon's Ann. Civ. St. Art. 6252-17.**

3. The requirement of **State Law V.A.T.S. Election Code, Art. 5.05, Subdivision 3,** that absentee voting shall begin **twenty days prior to the election.**

4. **V.A.T.S. Election Code, Art. 4.05 Subdivision 1,** stating that notice of the election must be **posted at least 20 days prior to the election in each precinct.**

5. **V.A.T.S. Election Code, Art. 4.05 Subdivision 1,** stating that in all cases that a copy of the notice shall be filed with

the County Clerk and another copy posted on a bulletin in the office of the County Clerk **at least 20 days before the election.**

6. **V.A.T.S. Election Code, Art.19.004 subsection (e),** requires that the County Judge shall give additional notice of the election by having a copy of the election order posted in a public place in each election precinct **not later than the 21st day before the election.**

7. **V.A.T.S Election Code, Art. 5.05, Subdivision 4c,** states that in the case of absentee voting, where the ballots are not available in time that the voting can be delayed, but that the voting shall take place **no later than the 10th day before the election.**

8. **V.A.T.S. Election Code, Art. 3.03** states that no election judge shall be related to any person who is employed by, or candidate whose name appears on the ballot within the second degree, either by affinity of consanguinity.

9. **V.A.T.S. Election Code, Art.8.32,** states that the presiding judge shall immediately place one copy of the returns, poll list, and ballots in an approved ballot box and deliver said box to the County Clerk within **24 hours** of closing the polls, and to deliver a key to said box to the Sheriff of said County.

10. **V.A.T.S. Election Code, Art. 3.03 (a)** states that all judges and clerks shall be qualified voters in the district holding the election.

Of all the items plead by the Plaintiff as being variations of the voting procedure, the only item to be cleared in the letter that was received from the Attorney General is No. 10.

There is nothing in the record to show there was any submission on the other 9 items set out in the Petitioner's pleadings. In fact the Respondent's pleadings admit they only had one absentee voting place in

the bond election, they further admit allegations that absentee voting did not occur at least 20 days prior to the election as required by Statute. In Respondent's Original pleadings, they admit that the absentee clerk is related to an employee of the district, and they also admit that the absentee voting clerk is not a resident of the school district. These are things they admit without contest and other items plead by the plaintiff must be taken as true in a consideration of whether to dismiss the complaint of the Plaintiff.

The Court in **McCain vs. Lybrand** supra stated the proposition;

**"To the extent there was any ambiguity in the scope of the pre-clearance request, the structure and purpose of the pre-clearance requirement plainly counsel against resolving such ambiguities in favor of the submitting jurisdiction..."**

To the extent that the request was made in both elections it is plain that the

matter should be resolved against the submitting party. The issue of imcomplete submission has been addressed by the Court in several cases, **McCain vs. Lybrand, N.A.A.C.P. vs. Hampton County Election Commission, Allen vs. State Board of Elections,** and others. In all cases the Court has stated that an incomplete submission does not clear those items that have not been submitted.

The Trial Court was in error in finding that the failure of the Attorney General to impose any objection meant that the matters had been properly cleared.

QUESTION NO. 2 RESTATED

Did the Trial Court error in ruling that the pleadings of the Plaintiff did not state a cause and the Federal Claims were insubstantial so not to hear the issue of whether a State Statute is constitutional that requires a bond to be posted before a hearing on the merits or be dismissed from the cause of action?

The Appellant would show that the pleadings and the briefs filed in the Trial Court demonstrated a cause of action under the Federal Voting Rights Act as well as a cause of action to test the constitutionality of 717m-1. The Courts consistently have ruled that before a complaint can be dismissed that the pleading must be taken in the best light to the Plaintiff. The Court in U.S. v. Howell, 318 Fed 162 (Ca 1963), stated;

"A complaint should not be dismissed because Plaintiff's lawyer had misconceived the proper legal theory of the claim and it

is sufficient if it shows that Plaintiff is entitled to any relief which the Court can grant, regardless of whether it asks for the proper relief....."

The cases on this issue are most favorable to the Plaintiff and the position of the Court is that if there is any thread of pleading for the Plaintiff that the case should not be dismissed as stated In re Longhorn Securities Litigation, D.C. Okl 1983, 573 F. Supp 278;

"In the context of motion to dismiss Court must construe the challenged pleading in light most favorable to the Plaintiff, must accept as true all well pleaded factual allegations, and reasonable inferences therefrom, and must disregard all legal or unsupported conclusions; complaint should not be dismissed merely because the Plaitiff's allegations do not support his stated legal theory as the Court is obligated to determine whether the allegations support relief on any possible theory."

The Court in **Conely Vs. Gibson, Tex 1957, 78 SCt 99, 355 U.S. 41, 2 L Ed 2nd 80** stated;

**"A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief."**

The Court in **Norwork Core Vs. Norwork Redevelopment Agency, CA Conn. 1968, 395 F2nd** stated;

**"Complaint is not subject to dismissal unless it appears to be certain that Plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support of its allegations, and even then Court ordinarily should not dismiss complaint except after affording every opportunity to Plaintiff to state claim upon which relief might be granted."**

The ruling that the Court does not have the authority to grant a Temporary Restraining Order because a State action is pending

is not applicable in this cause, the cases hold that in this type of action, the Court does not have the authority to act in this manner.

Petitioner would show that under V.A.T.S. 717m-1, that when a person desires to contest a bond election that the issuing agency can file for a Declaratory Judgement and join the election contest and ask that the Plaintiff post a bond or be dismissed from the law suit.

This has happened to the Plaintiffs in State Court, in that, before a hearing on the merits on the election contest, in which, the Plaintiff has plead the irregularities. The Court ordered the Plaintiff's to post a $50,000.00 bond within 10 days or be dismissed from the law suit. The Plaintiffs were unable to post a bond and were dismissed.

This requirement to post a bond before a hearing on the merits has been held unconstitutional by the Supreme Court of Texas

in **Buckholts Independent School District vs. Glaser, 632 S.W. 2nd 146 (Tex 1982).** The Appellees in their briefs in both the Trial Court and the Appeal Court have cited the case **City of Austin vs. Asmussen, 106 S. Ct 35 (1985),** which was dismissed for want of a Federal question. However, the facts in that case and this case are different, as in the **Austin** case there was a hearing on the merits of the election contest before the bond was set, but in this case there never was a hearing on the merits before the bond was set. This deprived the Plaintiffs on the right to have access to the Courts of the State of Texas without first posting a large bond, thereby, depriving the Plaintiff of right guaranteed under the due process clause of the Constitution of the United States.

A cause of action in which some of the same principals as in this cause of action is **Pine Township Citizens Association vs. Gene R Arnold, 453 F. Supp. 593.** In this

cause of action were required to post a bond to perfect an appeal from an adverse ruling in the Trial Court, regardless of the merit of their appeal, or the ability to post a bond, and the Court found that this was a substantial Federal question and the test stated in this case is set forth in **Goolsby vs. Osser, 409 U.S. 512, 518, 93 S. Ct. 854, 859, 35 L. Ed. 2nd 36 (1963).** A claim is unsubstantial only if;

**"its soundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.**

The Court in **Pine Township** went on to state:

**"We are aware of no case in which the United States Supreme Court has decided whether or not the 14th Amendment rights are violated when the singular procedure for perfecting substantive zoning appeals includes the potential requirement of a bond**

**without any consideration of the merits of the appeal and the financial ability of the appellant. As substantiality must rest upon the specific decisions of the Supreme Court, according to Goolsby, supra, we believe that Plaintiff's allegation that an exclusive procedure which permits some people to perfect substantive zoning appeal while per-cluding non-affluent others from availing themselves of the appeal procedure is a denial of due process and equal protection, is a substantial constitutional question."**

The portion of the case cited by the appellee and by the Trial Court, **U.S. vs. Saint Landry Parish School Bd, 691 Fed 859 (5th Cir 1979)**, does not apply to the set of facts in this cause of action. The section they have cited has to do with violations of the State Law by three poll commissioners. The Court went on to say the failure of officials to properly apply State Law is not a procedure that is the subject To Section 5. However, the court did go to say in other

sections of the opinion set forth below:

**"If a complaint brought under the approval provision of Voting Rights Act alleged that a change in voting procedures had been made with at least implicit approval of the State, a single-judge court cannot dismiss the complaint, no matter how small the change in voting procedure, a Three Judge Court must decide whether the change is covered by approval provisions of act. (head note 5)**

**.....the sufficiency of a complaint, a court must construe the complaint favorably to the pleader. Scherer v. Rhodes, 416 U.S. 1683, 1686, 40 Led 2nd 90, (1974). We must therefore, interpret the complaint, if possible, to state a claim upon which relief can be granted....." (Page 866)**

The Court ruled that the Federal claims to be insubstantial and therefore, was without the constitutional power to entertain the pendent claims. This is not the case here, as the changes in all the voting pro-

cedures are Federal issues as they have to be determined by a Three Judge Court and the Court should hear the issues, also the issue of denial of due process in regard to the State Statute is a Federal question that would require a Federal Court to hear.

The Trial Court held that the approval of the Attorney General on the submission for approval acted as a bar to the Appellants having any cause of action. If the Court found the pleading of the Appellant were insufficient they should have given the Appellant an opportunity to amend their pleadings.

The Court erred in dismissing the Temporary Restraining Order and in not granting the Appellants motion for injuctive relief pending the convening of the Three Judge Panel.

## CONCLUSION

The pleadings, evidence and briefs filed in the Trial Court showed that the Appellee had not timely, or properly, filed two elections for clearance with the Attorney General under Section 5 of the Civil Rights Act, 42, USC 1973c. The letter from the Attorney General does not preclude an action by private individual. The Trial Judge erred in ruling on the merits of the claim as by statute it is reserved to a Three Judge Court.

The decision of the Trial Court and Court of Appeals stands for the rule, even if the elections are not properly held according to **Berry**, that if you can get a post election clearance then the matter is settled and any suit contesting the election will be dismissed even if the submission was incorrect.

This would give any covered jurisdiction a "loop-hole" by which Section 5

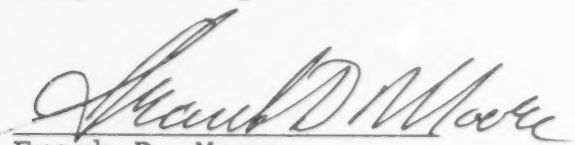
of the Voting Rights Act would be rendered totally worthless.

By allowing this decision to stand any Trial Court could void the protection granted by the Voting Rights Act, by declaring the claims were without merit and refusing to convene a Three Judge Court.

Using this, also he can avoid hearing pendent claims as he has already held the Federal claims unsubstantial.

There are substantial Federal questions on the issue of clearance and the conduct of the elections and it would be proper to hear the issue on the unconstitutionality of a State Statute. The pleading set forth a good cause of action, the matter should have been referred to a Three Judge Court.

Respectfully submitted



Frank D. Moore
TB# 14334000
41 West Side Square
Cooper, Texas 75432
Phone (214) 395-2053
**Attorney for Appellant**

## APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 86-2267

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W.T. "BUTCH" BURNS, ET AL.,

Plaintiffs-Appellants,

VERSUS

DELMAR WEST-LAMAR CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, ET A.,

Defendants-Appellees,

STATE OF TEXAS

Intervenor-Appellee.

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Appeal from the United States District Court
For the Eastern District of Texas
(Docket No. P-86-10-CA c/w P-86-14-CA)
(November 12, 1986)

Before THORNBERRY, DAVIS AND HILL, CIRCUIT JUDGES.

PER CURIAM: AFFIRMED. See Local Rule 47.6.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

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| W.T. "BUTCH" BURNS, ET AL., | ) | |
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| Plaintiffs | ) | |
| | ) | CIVIL ACTION |
| v. | ) | NO. P-86-10-CA |
| | ) | |
| DELMAR WEST-LAMAR CONSOLIDATED INDEPENDENT SCHOOL DISTRICT | ) | |
| | ) | |
| Defendant | ) | |
| | ) | |

O R D E R

On the fifth day of March, 1986 came to be heard Plaintiff's Application to Convene a Three-Judge Court and Application for a Temporary Restraining Order and Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted Under Rule 12 (b)(6) of the Fed. R. Civ. P. The Court, after considering the pleadings, briefs, and arguments of counsel, is of the opinion that the Application to convene a Three-Judge Court should be denied, that the Temporary Restraining Order heretofore entered be dissolved, that the Application for a Temporary Restraining Order be denied, and

Defendant's Motion to Dismiss be granted.

On February 11, 1986, Plaintiffs W.T. "Butch" Burns, Ted Carrington and Dwight Stegall filed a complaint in this Court against Delmar-West Lamar Consolidated Independent School District. This complaint, entitled Suit Under Declaratory Judgment Act to Declare State Statute Unconstitutional and to Enjoin Delmar-West Lamar Consolidated Independent School District From Further Action for Violation of Voting Rights Act Until Determination of State Statute and Rights of Plaintiffs Are Determined, alleged jurisdiction under "1. 42 USC Section 1971 Voting Rights Act of 1965; 2. 28 USC Section 2201 Declaratory Judgment Act; 3. U.S. Constitution. Amendments #1, #5, and #14" and sought a determination that a Texas statute (VACS 717m-1) is unconstitutional because of its provisions that a state court could require the posting of a bond by the Plaintiffs in order for them to proceed in a State court proceeding in the

EDITOR'S NOTE

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contest of the validity of bonds authorized by a bond election. Plaintiffs allege that if such bond was required of the Plaintiffs it would be a denial of due process under the First, Fifth and Fourteenth Amendments of the Constitution of the United States. Plaintiffs further allege that the Defendant failed to get approval of the bond election from the United States Justice Department and that the election therefore violated the Voting Rights Act.

Simultaneously the Plaintiffs filed an Application for Temporary Restraining Order seeking a temporary restraining order and permanent injuction from this Court to restrain and enjoin the Defendant from taking any further action in a suit in the District Court of Lamar County, 62nd Judicial District of Texas (styled EX Parte Delmar-West Lamar Independent School District, No. 51980 on the docket of such court) which had been filed by the Defendant seeking a declaratory judgment that bonds authorized by a vote

of the electorate held on November 2, 1985 are valid. On February 12, 1986, a hearing was held on Plaintiffs' Application for a Temporary Restraining Order and the Court finding that the Defendant was a political subdivision of the State and subject to the provisions of the Voting Rights Act; that the bond election was subject to preclearance under the Voting Rights Act; and that the Attorney General of the United States had not precleared such bond election as of February 12, 1986, a temporary restraining order was issued restraining the Defendant as requested by the Plaintiffs' motion for a preliminary injunction. The hearing was held on February 21, 1986 and the matter was taken under advisement by the Court and the temporary restraining order continued until a ruling by the Court.

On February 21, 1986 the Plaintiffs in Cause No. P-86-10-CA together with Roy L. Turner and Eddie L. Sams filed a complaint against Murray Winnie, the superintendent of

schools and the school board members of the West Lamar Independent School District on August 10, 1985, the time the consolidation election was held, John Brooks, the superintendent of schools, and the school board of the Delmar Independent School District on August 10, 1985, the time of the Consolidation election and John Brooks, the superintendent of schools and the school board trustees of the Delmar-West Lamar Consolidated Independent School District on November 2, 1985, at the time the bond election was held. (Civil Action No. P-86-14-CA). This complaint prayed that this Court grant the following relief to the Plaintiffs:

a. Convene a statutory court of Three (3) Judges pursuant to 28 U.S.C., Paragraph 2284 and 42 U.S.C., Paragraph 1973c;

b. Upon hearing adjudge and declare the elections of August 10, 1985 for the consolidation to be void for failure to secure the preclearance and the Election of

November 2, 1985 to be void for failure to secure preclearance and for voting procedure changes that promote discrimination all in violation of the Voting Rights Act of 1965 as amended.

c. Issue a Temporary Restraining Order and Temporary Injunction to restrain and prevent the defendants, their agents and successors and officers, together with all persons acting in concert with them, from taking any action on the consolidation of the schools or for issuance of the bonds from November 2, 1985 election.

d. Grant Plaintiffs reasonable attorney's fees and all costs and distributions of this suit and for such other and further relief as made equitable in these premises.

On February 26, 1986 the Court entered an order consolidating the two causes of action for all further proceedings and that the two causes proceed under P-87-10-CA.

## Claims Under Section 5 of the Voting Rights Act

Plaintiffs' allegations in support of the claimed violations of 42 U.S.C. Section 1973(c) center around two elections, the consolidation election of Delmar I.S.D. and West Lamar I.S.D. and the bond election held for the purpose of raising revenue to build a new school.

Title 42 U.S.C. Section 1973(c) (hereafter referred to as Section 5 of the Voting Rights Act) requires covered states to obtain approval of certain changes in their standards, practices or procedures with respect to voting. A covered state making a change in its voting procedures subject to the approval requirements must either submit the new procedure to the Attorney General for approval or bring a declaratory judgment action in the United States District Court for the District of Columbia. Texas and its political subdivisions are subject to these approval requirements.

Private parties may seek a declaratory judgment that a State has filed to comply with the provisions of Section 5 of the Voting Rights Act. Allen v. State Board of Elections, 89 S.Ct. 817, 827, (1969). They may bring this action in any United States District Court over which three judges shall preside to determine the issue of the asserted claim. If the three-judge court declares the complained of action to be covered by the approval requirements and the plaintiff proves that the State has failed to submit the covered enactment for approval, then the private party has standing to obtain an injunction against further enforcement. Allen v. State Board of Elections, 89S.Ct. at 826, supra. Under no circumstances would a three-judge court have authority to declare the elections which are the subject of plaintiffs complaints void based on Section 5 of the Voting Rights Act.

The single-judge district court to whom the request for a three-judge court is made

has authority to determine if a three-judge court is required. 28 U.S.C. Section 2284 (b)(3). While it is true that coverage questions must be determined by a three-judge court, Allen v. State Board of Elections, 89 S.Ct, at 830, supra, "a three-judge court is not required if the claim is wholly insubstantial or completely without merit. In such a case the single-judge court may properly dismiss the claim." United States v. Saint Landry Parish School Bd., 601 F.2d 859, 863 (5th Cir. 1979).

Specifically, the complaints before the Court allege that the Defendants failed to submit the elections for approval prior to the holding of the elections and failed to follow prodedures prescribed by the Texas Election Code. In Defendant's Motion to Dismiss and Original Answer in Cause No. P-86-14-CA is a letter attached as Exhibit "A" and dated March 3, 1986, from the Justice Department which reads:

"This refers to the procedures for con-

ducting the November 2, 1985, special election and the use of nonresident absentee election clerk for that election by the Delmar-West Lamar Consolidated Independent School District in Fannin and Lamar Counties, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on February 14, 1986.

The Attorney General does not interpose any objections to the changes in question."

In the same motion a letter, attached as Exhibit "C" and dated February 7, 1986, from the Justice Department which reads:

"This refers to the consolidation of the Delmar and West Lamar Independent School Districts; the at-large election of trustees; the procedures for conducting the August 10, 1985, special election; and bilingual election procedures for the Delmar-West Lamar Consolidated Independent School

District in Fannin and Lamar Counties, Texas, submitted to the Attorney General prusuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C., 1973c. We received your submission on December 9, 1985.

The Attorney General does not interpose any objections to the changes in question."

These two letters clearly establish that both, the elections and the procedures used for conducting the election, have now been submitted for approval and that the Attorney General interposes no objections.

The Court finds, based solely on the pleadings filed in these Section 5 claims are completely without merit, that there is no necessity for convening a three-judge court and that the Plaintiffs have failed to state a claim upon which relief can be granted under Section 5 of the Voting Rights Act.

Claim Under

Section 1971 of the Voting Rights Act

Section 1971(a) provides in pertinent part of that "all citizens. . .shall be entitled or allowed to vote. . .without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." 42 U.S.C. Section 1971(a)(1). Actions of state officials in conducting an election constitute actions of the state within the meaning of this section. 42 U.S.C. Section 1971(c); see Toney v. White, 476 F. 2d 203 (5th Cir. 1973).

The allegations in the complaints before this Court merely state Plaintiffs' rights under Section 1971(a) have been denied, and then track the language of the statute. "Pleadings that do nothing more than track the statute on which they attempt to base a claim are not well plead. Such language constitutes unsupported legal con-

clusions cast in the form of factual allegations, and pleadings that rely on such language fail to state a cause of action." Webber v. White, 422 F.Supp. 416, 429 (E.D. Tx 1976). It must contain allegations which, if proved, would constitute a violation of this section of the Voting Rights Act. This Court finds no such allegations in the complaints before it in these causes.

Fifteenth Amendment Claim

"The right of citizens of the United States to vote shall not be denied or abridged by the United States of by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, Section 1. The United States Supreme Court has repeatedly cited Gomillion v. Lightfoot, for the principle that racially discriminatory motivations is a necessary ingredient of a Fifteenth Amendment violation. See Arlington Heights v. Metropolitan Housing Dev. Corp., 97 S.Ct. 555, 563 (1977); Washington v. Davis, 96 S.Ct. 2040, 1047 (1976).

Absent such invidious purpose there can be no claim under the Fifteenth Amendment.

The complaints before this Court fall short of stating a claim under the Fifteenth Amendment. There are no allegations that anyone was denied the right to register to vote or to cast their ballot in the election process. Nor do they allege any purposeful acts by election officials or the election proces by which anyone was denied the right to vote because of race, color, or previous servitude.

Pendent State Claims

Plaintiffs' have alleged in their complaint numerous violations of the Election Code of the State of Texas, but such complaints reveal that the Plaintiffs currently have a suit pending in a State district court on the identical state claims raised here. This Court finds no authority under the anti-injunction statute 28 U.S.C. Section 2283 by which the Court could grant the relief sought by Plaintiffs. That statute

prohibits a court of the United States from enjcining proceedings in a State court except where necessary in aid of it jurisdiction or to protect or effectuate its judgments. These state claims do not come within either of the exceptions in 28 U.S.C. Section 2283.

In United Mine Workers of America v. Gibbs, 86 S.Ct. 1130 (1966) the court drew a fine distinction between power and discretion of a federal court to entertain a pendent claim. It defined power very broadly, but then identified a number of factors that the court must consider in exercising its discertion whether to hear the pendent claim. On the question of power to hear the pendent claim, the Court said that if the pleadings disclose a substantial federal claim, there is power to hear pendent claims that "derive from a common nucleus of operative fact" and that if the claims are such that a Plaintiff "would ordinarily be expected to try them all in one judicial pro-

ceeding." United Mine Workers of America v. Gibbs, 86 S.Ct. at 1138, supra. Thus if the federal claim is too insubstantial to be the basis for federal question jurisdiction, there can be no pendent jurisdiction of other claims. Junker v. Crory, 650 F.2d 1349, 1357 (5th Cir. 1981).

If it is determined by a court that it is the constitutional power to hear the pendent claim it then turns upon the court's discretionary power to entertain the claim. The Court in Gibbs announced flatly that "pendent jurisdiction is a doctorine of discretion, not of plaintiff's right," United Mine Workers of America v. Gibbs, 86 S.Ct. at 1139, supra, and described the relevant considerations of judicial economy, convenience and fairness to litigants in the exercise of that discretion.

The Court finds the federal claim to be insubstantial and therefore is without the constitutional power to entertain the pendent claims.

Plaintiffs' Other Claims

Plaintiff is seeking a determination by this Court that Article 717m-1 of Vernon's Annotated Texas Statutes is unconstitutional on the grounds that it denies them due process in their State court hearings to be de-annexed fom the consolidated school district. This statute has been heretofore declared constitutional by the Supreme Court of Texas in Buckholts ISD v. Glaser, 632 SW2d 146 (Tex. 1982). There the Court said that there can be no denial of due process in requiring a bond in connection with challenge to a bond issue election, especially were taxpayers are required to post the bond only if they fail to show entitlement to a temporary injunction. Furthermore, the Supreme Court of the United States in dismissing the appeal in Asumussen v. City of Austin, Texas, et al., 106 S.Ct. 35 (1985) held that there was want of substantial federal question in the application of the bond provision of Article 717m-1 in

a State court proceeding.

The Court has considered whether Plaintiffs' complaint contains sufficient allegations to support a claim under Section 2 of the Voting Rights Act or under the First and Fifth Amendments to the Constitution of the United States and finds that the complaint is insufficient in this respect.

It is, therefore, ORDERED that the Temporary Restraining Order entered on February 12, 1986, be and the same is hereby, dissolved.

It is further ORDERED that Plaintiffs' Application for Injunctive Relief be, and the same is hereby, denied.

It is further ORDERED that Defendants' Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for Failure to State a Claim Upon Which Relief May be Granted, be and the same is hereby GRANTED and this cause is hereby dismissed

Signed this 20th day of March, 1986

UNITED STATES DISTRICT JUDGE